



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL APPEAL NO. E011 OF 2021**

*(From the Conviction and Sentence in Criminal Case Number E147 of 2021 by*

*Hon. L. Kiniale the Principal Magistrate at Bomet)*

**MANYIBEI YAMDO alias EZEKIEL BIOMDO..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant was convicted of the offence of fraudulently procuring the registration of a document related to land contrary to Section 157 (1) (c) of the Land Act. The particulars of the charge were that on the 5<sup>th</sup> day of December 2017 at Bomet District Land Registry in Bomet County, with others with others not before court, fraudulently procured the registration of a document related to land namely Title Deed of parcel number Kericho/Olokyin/804.

2. The Appellant faced an alternative charge of intermeddling with property of a deceased person contrary to Section 45 (1) as read with Section 45 (2) of the Law of Succession Act, Cap 160 Laws of Kenya.

3. The Appellant was convicted on his own plea of guilty on both counts. On count 1, he was sentenced to pay a fine of Kshs 200,000 or in default to serve a prison term of 2 years. On count 2, he was sentenced to pay a fine of Kshs 5000 or in default to serve a prison term of one month. The two sentences were to run concurrently.

4. Being dissatisfied with the Sentence, the Appellant appealed on the following grounds: -

i. **THAT** the learned trial magistrate erred in law and fact by sentencing the appellant based on the wrong provisions of the law as contained in the charge sheet.

ii. **THAT** the learned trial magistrate erred in law and fact by sentencing the appellant without considering that he was a first offender, and further by failing to order for a Probation Report which would have given the court extra information, therefore enabling it to arrive at a just and fair sentence.

iii. **THAT** the learned trial magistrate erred in law and fact by sentencing the appellant to serve two (2) years I custody and or pay a huge fine without considering his age, and or ability of the appellant hence punishing him excessively.

5. I have perused the trial court proceedings, and given due considerations to the Memorandum of Appeal dated 23<sup>rd</sup> March 2021, the Appellant's Written Submissions dated 16<sup>th</sup> December 2021, and the Respondent's written submissions dated 28<sup>th</sup> February 2022. The two issues for my determination are whether the Appellant's plea was equivocal and therefore entitled to appeal his conviction, and whether the Sentence preferred against him was manifestly excessive, harsh and severe.

6. It is salient to note that the appellant had pleaded guilty to the two charges. Section 348 of the Criminal Procedure Code states as follows:

*“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence”.*

7. The dangers of entering a plea of guilt was appreciated by the Court of Appeal in Elijah **Njihia Wakianda V Republic (2016) eKLR**, where it observed that:

*“Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt.*

*Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms”*

8. My perusal of the trial proceedings revealed that the Appellant pleaded guilty when the charges were read to him. The trial court sought to clarify from him whether he understood the charges and the consequences of pleading guilty. The Appellant stated that he understood the seriousness of the charges and the severity of the sentence. The facts were then read out to him and he accepted them as true. It was on that basis that the trial court convicted him on both counts on his own plea of guilty. It is my finding therefore that his plea was unequivocal and that consequently **Section 348 of the Criminal Procedure Code** was applicable to him. He is not entitled to appeal his conviction.

**Whether the Sentence preferred against the Appellant was manifestly excessive, harsh and severe.**

9. I now turn my attention to the sentences meted out by the trial court. In so doing, I am guided by the case of **Benard Kimani Gacheru VS Republic (2002) eKLR**, where the Court of Appeal stated that: -

*“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist”.*

10. In mitigation, before the trial court the Appellant prayed for leniency and stated that he would not repeat the offence. He asked for a probationary sentence to enable him right his wrongs with his family.

11. The first offence is covered under Section 157 (1) (c) of the Land Act which provides that: -

*“Any person who fraudulently procures the registration or issue of any certificate of ownership, or any other document or instrument relating to the land, upon conviction, is liable to a fine not exceeding ten million shillings or imprisonment for a term not exceeding ten years or to both the fine and imprisonment”.*

12. The penal section for the second charge is provided under Section 45 (2) (a) which provided that if a person was guilty of intermeddling with the property of a deceased person, he/she would be guilty of that offence and would be liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both.

13. The Criminal Procedure Bench Book at page 116 provides that:

*“The sentences imposed should be geared towards achieving the following objectives set out in the sentencing policy guidelines (paragraph 4.1):*

- i. Retribution.*
- ii. Deterrence.*
- iii. Rehabilitation.*
- iv. Restorative justice.*
- v. Incapacitating the offender.*
- vi. Denouncing the offence, on behalf of the community”.*

At the very same page, at paragraph 24, the bench book states:

*“Generally, a maximum sentence should not be imposed on a first offender unless there are aggravating circumstances”.*

14. The Appellant submitted in this appeal that the sentence was harsh and excessive. Counsel urged the court to revise the sentence in view of the age of the Appellant who said to be 65 years old.

15. This court received a Probation Report on the Appellant. The same was filed on 9<sup>th</sup> February 2022. The report indicated that his family members who were the victims of his offence had forgiven him and were ready to receive him back home. The local community members have promised to play an essential part in his rehabilitation and reintegration back into the society. The report also indicated that the Appellant was repentant and remorseful and would seek forgiveness and reconciliation with the complainant.

16. I have taken into consideration the submissions in mitigation as well as the Probation Report. In particular, I have considered that the Appellant was of advanced age and was willing to go and make amends with his family. I also observe that he has already served approximately a year of his sentence and was a first offender. He is deserving the mercy of the Court.

17. In the end, I uphold the conviction. The appeal against sentence succeeds. The Appellant's sentence is reduced to the period already served. He is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF MARCH, 2022.**

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**R. LAGAT-KORIR**

**JUDGE**

**Judgment delivered in the presence of Mr J.K Koech holding brief for Mr. Kenduiwo for the Appellant, Mr. Waweru for state and Kiprotich (Court Assistant).**